Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1536

DONALD ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL H. ROSEN
Attorney for Petitioner

Office and PO Address:
460 Maynard Building
Seattle, WA 98104
(206) 682-6644

ABCD AT CRAFTSMAN PRESS, SEATTLE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ____

DONALD ROMANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Donald Romano respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 14, 1980.

OPINIONS BELOW

The unpublished opinion of the court of appeals and their order denying the Petition For Rehearing appear as Appendices "A" and "B".

The opinion rendered by the District Court for the Western District of Washington appears as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 14, 1980, affirming petitioner's conviction dated April 6, 1979. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 3, 1980. On March 17, 1980, U.S. Circuit Judge Trask signed an Order Staying Issuance of the Mandate pending the timely filing of the petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Ninth Circuit applied the improper Fourth Amendment constitutional standard in determining the existence of the exigent circumstances justifying the warrantless entry of petitioner's dwelling?

2. Whether the Fourth Amendment requires that an illegal seizure, undertaken to secure a

residence pending the issuance of a valid search warrant, mandates the suppression of evidence obtained pursuant to the execution of said warrant?

STATEMENT OF THE CASE

The defendant was convicted in Federal District Court of the Western District of Washington of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. The stipulated facts state, in part, that Federal Agent Bansmer made several purchases of cocaine from one Clarke, during the months of October and November of 1978. Clarke expressed to Bansmer that his sources were fearful he was an agent. The police surveiled Clarke and determined his source occupied a residence on Eastern Avenue,in Seattle. Branch, Clarke's source on Eastern Avenue, was followed to a residence of Franklin Avenue in Seattle the evening the search occurred. Branch returned to Eastern Avenue, Clarke left and sold an ounce of cocaine to the agent. Clarke returned to Eastern Avenue to obtain another ounce of cocaine to sell to the agent. Branch was again

followed to the Franklin Avenue residence where she stayed a short while and returned to the Eastern Avenue residence. Clarke left and sold another ounce of cocaine to the agent and was arrested. At that time, the agents requested a search warrant for the Franklin Avenue residence. Surveillance was set up of the residence pending issuance of the search warrant. The police observed a man with a beard in the window of the residence and no one else. They had no knowledge of who occupied the house or how many people were actually inside. A person exited the house and was arrested while entering his car. The police did not recognize this individual (Schaefer) as the bearded person previously seen in the window. Although the search warrant had not yet arrived, the agents were fearful that Schaefer's arrest had taken place sufficiently close to the house to reveal their presence to the occupant and they entered the residence and arrested the defendant. When the warrant arrived two hours later, a search was conducted and drugs and paraphernalia were found.

Petitioner's motion to suppress based on the Fourth Amendment being violated was denied by the district court on February 9, 1979, and the court of appeals affirmed holding that exigent circumstances existed to permit a warrantless entry, but, even if the entry was illegal the evidence obtained pursuant to the search warrant was not tainted because the issuance and execution of the warrant could not be traced to the illegal entry.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With This Court's Interpretation of the Imminent Destruction of Evidence Exception to the Warrant Requirement of the Fourth Amendment

This Court has held that warrantless entries are "per se" unreasonable and thus in violation of the Fourth Amendment except for only a few specifically and well-delineated situations. Vale v. Louisiana, 399 U.S. 30, 26 L. Ed. 2d 409 (1970); Katz v. United States, 389 U.S. 397, 19 L. Ed. 2d 576 (1967); Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290 (1978).

The "imminent destruction of evidence" is recognized as an exception to the warrant requirement. See Vale and Mincey, supra. In Mincey, this Court held that the Government has the burden of establishing that the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.

The opinion bleow holds that a police officer's subjective belief that a possibility existed that petitioner would destroy evidence is sufficient to meet the burden of showing the "imminent destruction of evidence". See Appendix A, p. 8. No evidence was offered to prove that petitioner was actually aware of police surveillance. The agents did not know who owned the house; how many people were inside; who Branch was receiving the cocaine from or if she was, in fact, receiving the cocaine from a resident of the house. The only evidence offered was the subjective belief of the police officials that due to the arrest of Schaefer outside the residence, a possibility

existed that petitioner would become aware of police surveillance and then destroy evidence.

This holding is in conflict with the objectively reasonable test of the Fourth Amendment as laid down in Mincey, supra.

B. The Decision Below Conflicts With the Highest State Courts of California and Washington as to the Appropriate Application of the Fourth Amendment's Exclusionary Rule

The Exclusionary Rule provides that evidence obtained in violation of the Fourth Amendment may not be used in the prosecution of the accused. Weeks v. United States, 232 U.S. 383, 58 L. Ed. 652 (1914); Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441 (1963). The Ninth Circuit has held that government agents may illegally seize a residence to secure it until a search warrant arrives so long as the issuance and/or execution of the warrant cannot be traced to the illegal seizure. United States v. Blalock, 578 F.2d 245 (9th Cir. 1978); United States v. Grummel, 542 F.2d

789 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977).

In direct conflict, the State Supreme Courts of California and Washington hold that when agents illegally seize a residence, the subsequent arrival of a valid search warrant will not act to disinfect the illegal seizure even though the issuance and execution of the search warrant are independent of the initial illegality. People v. Shuey, 13 Cal. 3d 835, 533 P.2d 211 (1975); State v. Bean, 89 Wn.2d 467, 572 P.2d 1102 (1978).

Thus, residents of California or Washington who have their residences seized illegally by state officials are told by their State Supreme Court that this violates the Federal Constitution in that an illegal seizure has occurred and all the evidence must be suppressed. However, the same residents who have their residences seized illegally by federal officials are told by the Ninth Circuit that the Federal Constitution permits this conduct and that the evidence will not be sup-

pressed if a valid warrant is subsequently obtained.

In Elkins v. United States, 364 U.S. 206, 4 L. Ed. 2d 1669 (1960), this Court held that the "Silver Platter" doctrine (where evidence illegally obtained by state agents was admitted in a federal criminal trial) acted to circumvent the Exclusionary Rule and thus was unconstitutional.

As in Elkins, a similar dilemma exists because of a conflict in federal and state courts in applying the Exclusionary Rule in the same factual situation. In Elkins, this Court stated:

> To the victim it matters not whether his constitutional right has been invaded by a Federal Agent or by a State officer . . . the very essence of a healthy federalism depends upon the avoidance of needless conflict between State and Federal Courts.

364 U.S. 206 at 215, 221.

In United States v. Ceccolini, 455 U.S. 268, 55 L. Ed. 2d 268 (1978), this Court re-emphasized that in order to effectuate the deterrence rationale of the Exclusionary Rule, it is best to apply it in areas where its remedial objectives are

thought more efficaciously served. Citing United States v. Calandra, 414 U.S. 338, 38 L. Ed. 2d 561 (1974).

The application of the Exclusionary Rule in the factual context of deterring police officers from illegally seizing a residence by occupying the premises and restraining individual movement for an extended period of time until a search warrant arrives is an area where the remedial objections of the Exclusionary Rule is efficaciously served. The rationale adopted by the Supreme Courts of California and Washington is the appropriate application of the Exclusionary Rule.

CONCLUSION

For these reasons Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

MICHAEL H. ROSEN
Attorney for Petitioner

APPENDIX "A"

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 79-1335
vs.	)	DC No. CR78-360VX
DONALD ROMANO, Defendent-Appellant.	)	MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington
at Seattle

Before: COWEN,* Senior Judge, TRASK and HUG, Circuit Judges

Appellant Donald Romano was convicted in federal court of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. He appeals both convictions on the ground that the trial court erred in denying his motion to suppress evidence seized during a search of his home. We affirm.

I

The pertinent facts have been stipulated. DEA undercover agent Bansmer had several meetings with a suspected cocaine dealer, David Clarke. Although Clarke was unaware of Bansmer's true identity, he did express his concern, as well as that of his source, that Bansmer was a federal agent. On October 13, 1978, Clarke sold Bansmer an ounce of

*Honorable Wilson Cowen, Senior Judge, United States Court of Claims, sitting by designation.

cocaine. After the transaction, Clarke was followed to a nearby shopping center, where he entered a pickup truck driven by a then unidentified woman. After twenty minutes, Clarke left the truck and proceeded to his place of business.

On November 28, 1978, Clarke and Bansmer met again. Clarke offered to sell Bansmer four ounces of cocaine, but said that his source would first have to travel to a nearby residence where the cocaine was stored, and bring it back to Clarke. Clarke would then return to Bansmer to complete the sale.

Federal agents followed Clarke to a residence on Eastern Avenue, in Seattle. Shortly after Clarke entered the residence, a woman left, entered a pickup truck and was followed to a house on Franklin Avenue. The woman was later identified as Linda Branch. Both she and her truck were recognized by the agents as the person and vehicle previously contacted by Clarke after the October 13 transaction.

Shortly after Branch entered the Franklin Avenue address, she returned to Eastern Avenue. Then Clarke left the Eastern Avenue address, returned to Bansmer, and sold him one ounce of cocaine.

Next, Clark returned to Eastern Avenue. Branch again left her residence and drove to the house on Franklin Avenue, where she stayed a short while. When she returned to the Eastern Avenue residence, Clarke left, met again with Bansmer, and sold him another ounce of cocaine. Clarke was then arrested. At that time, another federal agent contacted an assistant United States attorney to ask him to request a telephonic search warrant for the Franklin Avenue residence.

At 11:00 p.m., other agents set up surveillance of the Franklin Avenue residence pending issuance of the search warrant. They observed a woman enter the house, leave alone after a short time, and drive away. The lights in the house were still on. After a long period of time, one of the agents spotted a man with a beard walking in front of a window inside the residence. They saw no one else.

At 1:00 a.m., the door opened. Because the agents were in the open, they moved to cover and were unable to see who had left. Believing that the occupant of the house had supplied two ounces of cocaine to Branch, the agents arrested the person leaving the house just after he had entered a car. At that point, the agents discovered that the man they had arrested, later identified as Schaefer, was not the bearded man they had glimpsed near the window. Realizing that this meant that at least one other person was still inside, and fearful that the arrest had taken place sufficiently close to the house to reveal their presence to the occupant, the agents then knocked on the door of the house. The bearded man, later identified as Romano, answered. The agents arrested Romano, entered the residence, went through it looking for other occupants, and, finding none, stayed to await the search warrant.

When the the [sic] warrant was issued, the agents searched the house and recovered large quantities of cocaine and other drugs, praphernalia for measuring narcotics, and $2500 in prerecorded bills. A five-count indictment was brought against Romano. Prior to trial, he moved to suppress all the above evidence as the product of an illegal search. Based on the stipulated facts, the district court denied the motion and subsequently found Romano guilty on the two counts described

earlier. Romano appeals on the sole ground that the district court erred in denying his motion to suppress.

Appellant argues that the warrantless search of his home violated the Fourth Amendment, and that the evidence he sought to suppress was the product of that illegal search. We believe that appellant's argument fails in both respects.

II

The fourth amendment prohibits "unreasonable searches and seizures." A warrantless search of a house will automatically be held unreasonable unless the government shows by a preponderance of the evidence that the search falls within one of the recognized exceptions to the warrant requirement. Vale v. Louisiana, 399 U.S. 30, 35 (1970); United States v. Marshall, 488 F.2d 1169, 1186 (9th Cir. 1973). To support its warrantless search of Romano's house, the government relied upon "exigent circumstances." See United States v. Fulton, 549 F.2d 1325 (9th Cir. 1977); United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); United States v. Curran, 498 F.2d 30 (9th cir. 1974). Romano argues that the events cited by the government did not constitute exigent circumstances and, alternatively, that even if they did, they resulted from police misconduct that could not serve as the basis for dispensing with a search warrant.

III

The trial court's finding that exigent circumstances exist can be reversed on appeal only if the finding is "clearly erroneous." United States v. Flickinger, 573 F.2d 1349, 1357 (9th Cir.), cert. denied, 439 U.S. 836 (1978). The government argues that the arrest of Schaefer outside Romano's

house might have alerted Ramono to the surveillance. In such an event, there was a serious possibility that Romano would destroy the evidence before the police had a chance to seize it.

There is no doubt that the imminent destruction of evidence constitutes an exigent circumstance justifying a warrantless search. United States v. Grummel, 542 F.2d 789 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977); United States v. McLaughlin, supra at 521; United States v. Curran, supra at 35. In McLaughlin, we found exigent circumstances where the arrest of one co-conspirator outside the home of another made it likely the occupants would discover they were under surveillance and destroy the evidence. Cf. United States v. Fulton, 549 F.2d 1325 (9th Cir. 1977) (arrest of one co-conspirator in proximity of house justified warrantless search to prevent escape of another co-conspirator).

The fact situation here is virtually identical to that in Mclaughlin. Appellant argues that because the arrest was made in an alley beneath the major interstate freeway through Seattle, and because it is not claimed that a commotion ensued, the government has not established the likelihood that Romano was aware of the arrest. Given the close proximity, however, we are unable to say that the district court's finding was "clearly erroneous."

Our conclusion is bolstered when it is considered that the police had an additional reason for fearing imminent destruction of evidence. The police had ample cause to assume that Clarke had obtained the cocaine from Branch, and that Branch, in turn, had obtained it from Romano. Bansmer, however, paid Clarke only after receiving the cocaine; thus, there existed the strong possibility that the arrangement was for Clarke to pay Branch

only after Clarke had received payment from Bansmer, and for Branch to pay Romano only after being paid by Clarke. Clarke having been arrested, it was highly possible that Romano still had not received payment. By 1:00 a.m. it had been two hours since the arrest of Clarke, and the police legitimately feared that Romano would soon become suspicious. Their concern is especially understandable in light of Clarke's statements to Bansmer that Clarke's source was concerned that Bansmer might be a federal agent.

We therefore hold that the above facts support the district court's finding of exigent circumstances. As in McLaughlin, we emphasize that those circumstances justified a warrantless search only to the extent needed to prevent the destruction of evidence. Once the police had secured the premises against such a contingency, they very properly refrained from conducting a full search until the warrant had been issued.

IV

We must next address appellant's contention that any exigent circumstances resulted from police misconduct. Appellant argues that the police lacked probable cause to arrest Schaefer, and that his arrest therefore could not serve as the basis for excusing the requirement of a search warrant. To support his conclusion that the arrest was illegal, appellant cites Johnson v. United States, 333 U.S. 10 (1948). In Johnson the Supreme Court held that a person's physical presence on premises in which narcotics are also present does not constitute probable cause to arrest the person for

possession of narcotics.[1] Here, once the police had seen the man they had arrested, they realized that he had not been the sole occupant of the house. Appellant thus maintains that the arrest of Schaefer was illegal. He then cites United States v. Calhoun, 542 F.2d 1094, 1102 (9th Cir. 1976), cert. denied. sub nom. 429 U.S. 1064 (1977), for the proposition that exigent circumstances created by police misconduct cannot serve to validate a warrantless search.

Appellant's reliance on Calhoun is misplaced. In that case, despite having ample time in which to secure a warrant, the police failed even to seek one. We held that the police could and should have requested a warrant and maintained surveillance of the house while waiting for the warrant to be issued. That is precisely what the police did here. As discussed above, the police had to seek cover when they heard Schaefer leave the house. Having done so, they were unable to discover the identity of Schaefer until they stopped him. By then, it was too late to avoid creating the risk that the occupant of the house had seen or heard the activity.

Whether the police were right or wrong in believing that there was probable cause to make a formal arrest, it cannot be argued that they misbehaved in stopping Schaefer as he entered

---

1. Appellant also cites Evans v. United States, 257 F.2d 121 (9th Cir.), cert. denied 358 U.S. 866 (1958). In Evans, however, the court held only that such evidence was insufficient to convict. It did not hold that such evidence was insufficient even to support probably cause to arrest.

his car. It was the verbal and physical activity arising from their perfectly proper decision to stop Schaefer that created the possibility of alerting Romano to the presence of the police. We therefore hold that the exigent circumstances on which the government relies were not the result of any police misconduct in arresting Schaefer.

We add that the arrest was not the only basis on which the police concluded that exigent circumstances existed. As noted earlier, they believed that Romano would soon become suspicious over the failure of Clarke to return with the money. Thus, even if appellant could show that police misbehavior in arresting Schaefer precluded using the arrest as a basis for finding exigent circumstances, it is possible that the suspicion created by the long delay would serve as an independent basis for such a finding.

Because we hold that exigent circumstances justified the warrantless search of Romano's house, we affirm the judgment of conviction.

V

Even if appellant had shown that the warrantless search had been illegal, his argument would fail because the evidence he sought to suppress was not the product of that search. Appellant contends that the warrantless search was so closely connected with the subsequent search for which a warrant was obtained that evidence seized during the latter was tainted by its association with the former.

This court has previously decided cases in which an appellant has argued that evidence seized pursuant to a valid search warrant was tainted by its association with a prior warrantless search. See United States v. Blalock, 578 F.2d 245 (9th

Cir. 1978); United States v. Grummel, 542 F.2d 789 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977). We have held that the evidence would be tained only if either the issuance or the execution of the warrant could be traced to the misconduct. Cf. United States v. Bacall, 443 F.2d 1050, 1056 (9th Cir.), cert. denied, 404 U.S. 1004 (1971). Here the affidavit accompanying the request for a warrant had actually been submitted before the warrantless search. Nor is there any allegation that the execution of the warrant was facilitated by information gained from the earlier search. Appellant's argument therefore fails for the additional reason that he has not connected the evidence in question with the allegedly illegal warrantless search.

APPENDIX "B"

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. CA 79-1335
vs.	)	No. DC No. CR78-360VX
DONALD ROMANO, Defendent-Appellant.	)	O R D E R

Before: COWEN,* Senior Judge, TRASK and HUG, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Cowen does not vote as to the suggestion for rehearing en banc. Judge Trask recommends the suggestion for rehearing en banc be rejected. Judge Hug votes to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote for en banc rehearing. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*Honorable Wilson Cowen, Senior Judge, United States Court of Claims, sitting by designation.

APPENDIX "C"

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STAIES OF AMERICA, Plaintiff,	)	No. CR78-360VX
vs.	)	ORDER ON DEFENDANTS MOTION TO SUPPRESS
DONALD ROMANO, Defendent.	)	

Having considered defendant's motion to suppress together with the memorandum and stipulated facts filed by counsel, the Court now finds and rules as follows:

1. It is clear that the threat of imminent destruction of evidence is an exigent circumstance justifying a warrantless search. United States v. Curran, 498 F.2d 30 (9th Cir. 1974). It is also clear that an arrest in the proximity of a residence which makes it likely that those in the residence will discover that they are under surveillance and that they are likely to destroy evidence is an exigent circumstance which justifies a warrantless entry to make an arrest and to secure the premises to the extent necessary to prevent the destruction or removal of evidence. United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975); United States v. Fulton, 549 F.2d 1325 (9th Cir. 1977).

2. The circumstances leading up to the warrantless entry of defendant's residence in this case are substantially the same as those in McLaughlin. Once the DEA agents had effected the arrest of Kevin Schaefer in the proximity of defendant's residence, they had reason to, and did, believe that the occupant or occupants might be

alerted to the fact that the house was under surveillance and thereupon destroy any evidence of illegal activity.

3. The fact that the agents may not have had probable cause to make the triggering arrest is not controlling. It is apparent that the stipulated facts that the agents were acting in good faith, that they reasonably believed that there was only one occupant in the house, that they had probable cause to arrest the defendant, and that they mistakenly arrested a man whom they reasonably believed to be the defendant. There is no question but that the agents were acting in good faith. There is no evidence or reasonable inference from evidence that, in arresting Schaefer, the agents were acting so to create exigent circumstances. This is not a situation where there is a possibility of abuse because the exigent circumstances which arose were entirely unplanned and unanticipated by the agents. See United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir. 1973).

4. Defendant's reliance upon United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976) and United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974), is unavailing. The "foreseeable consequences" rationale employed by the courts in those cases is not applicable to the instant case. The agents in this case could not have foreseen the exigent circumstances which arose from their mistakenly arresting Schaefer in the proximity of the defendant's residence.

5. The procedure employed by the agents in this case in entering and securing the premises to the extent necessary to prevent the destruction of evidence but not conducting a search of the premises prior to the arrival of a warrant is precisely the procedure which was upheld in McLaughlin, supra. Defendant's motion to suppress must in consequence be denied.

Accordingly, the motion of defendant to suppress evidence is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 8th day of February, 1979.

/s/ Donald S. Voorhees
United States District Judge